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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 789

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, PETITIONER

vs.

JEFFIE D. SULLIVAN

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 10, 1938
CERTIORARI GRANTED MARCH 28, 1938

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TRANSCRIPT OF RECORD

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 8555

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, RESPONDENT. *Appellant*	No. 1253 HABEAS CORPUS	
versus		
JEFFIE D. SULLIVAN, PETITIONER, *Appellee*		

Appeal from the District Court of the United States for the Northern District of Georgia, Atlanta Division.

LAWRENCE S. CAMP, ESQ.
United States Attorney, Atlanta. Ga.
HARVEY H. TYSINGER, ESQ.,
Asst. United States Attorney, Atlanta, Ga.
H. T. NICHOLS, ESQ.,
Asst. United States Attorney, Atlanta, Ga.
Counsel for Appellant

JEFFIE D. SULLIVAN,
204 *Winston Street, Huntsville, Alabama.*
In Propria Persona.

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INDEX

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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

JEFFIE D. SULLIVAN,
Petitioner,

vs.

FRED G. ZERBST, Warden, U. S. Penitentiary, Atlanta, Georgia,
Respondent.

No. 1253
HABEAS CORPUS

PETITION

Now comes Jeffie D. Sullivan and respectfully shows to this Honorable Court that he is a citizen of the United States and is now unlawfully held and restrained of his liberty by Fred G. Zerbst, Warden of the United States Penitentiary, at Atlanta, Ga., within the jurisdiction of this Honorable Court.

1

That in May, 1934, your petitioner pleaded guilty in the United States District Court for the Northern District of Alabama, and was sentenced to be imprisoned for twenty-two months. Your petitioner actually served 17 months and 18 days, and was given a conditional release, and discharged from the penitentiary as if on parole, for the full term of his sentence.

2

That on the 9th day of April, 1936, your petitioner

was again sentenced in the same Court to serve a term of 18 months in a penitentiary. Your petitioner was duly committed to the Atlanta Penitentiary pursuant to said sentence and has now executed the same in full. Petitioner respectfully shows that this latter sentence was silent as to sequence of service, and contained no provision whatever that it was to run either consecutively or concurrently with any other sentence. Petitioner avers that by operation of law said two sentences should be construed as running concurrently.

3

Petitioner further respectfully shows to the Court that during his incarceration under said second sentence the parole warrant which issued for violation of his conditional release was never executed, but was held in abeyance until after petitioner had served in full his said second sentence. Upon completion of this sentence the parole warrant was exhibited to your petitioner and petitioner was informed by the officials of the Atlanta Penitentiary that he was being held to perform the unexpired balance of the first sentence on which he was paroled.

4

Petitioner respectfully shows that when he was released on parole or conditional release there remained approximately four months and twelve days of unserved time under this sentence, and that on the latter sentence of 18 months petitioner has served, with deduction for good time, 13 months and 22 days. Petitioner shows to the Court that if the two sentences be computed as running concurrently, his time is now up, and in fact

he would have been eligible for discharge from custody on June 23rd, 1937. Therefore there is no question of prematurity involved in this petition for habeas corpus.

WHEREFORE, your petitioner prays that he be released from unlawful custody and that this Honorable Court issue its writ of habeas corpus directing the respondent herein to produce the body of your petitioner before this Honorable Court, at a time and place to be specified therein, and that respondent be required to show cause, if any he has, why your petitioner should not be released.

JEFFIE D. SULLIVAN,
Petitioner.

GEORGIA,
FULTON COUNTY:

AFFIDAVIT

Personally appeared before me the undersigned attesting officer, Jeffie D. Sullivan, who after being duly sworn deposes and says that he has read the foregoing petition, that he knows the contents thereof, and that the allegations therein contained are true to the best of his knowledge and belief, and that he believes he is entitled to the redress sought therein.

JEFFIE D. SULLIVAN.

SUBSCRIBED AND SWORN TO BEFORE ME THIS THE 20 DAY OF JULY, 1937.

M. O. HOLLIS,
Notary Public, State at Large, Atlanta, Ga.
(*Notary Seal*)

AFFIDAVIT IN FORMA PAUPERIS

GEORGIA,
FULTON COUNTY:

Petitioner being duly sworn deposes and says that he is a citizen of the United States, of legal age, and that at present he is imprisoned and detained in the United States Penitentiary at Atlanta, Ga., and within the jurisdiction of this Honorable Court, that he wishes to bring an action in this Honorable Court to test the legality of his said imprisonment and detention, but that because of his poverty he is unable to pay the costs of the said action, or to give security for same and that he believes he is entitled to the redress he seeks therein.

Wherefore petitioner respectfully prays that this Honorable Court grant him permission to file and prosecute the said action without costs.

JEFFIE D. SULLIVAN.

SWORN TO AND SUBSCRIBED BEFORE ME THIS THE 20TH DAY OF JULY, 1937.

M. O. HOLLIS,

Notary Public State at Large, Atlanta, Ga.
(Notary Seal)

ORDER GRANTING WRIT IN FORMA PAUPERIS

Read and considered. Let the writ issue as prayed, in forma pauperis, returnable before me at Atlanta,

Georgia, at 10:00 o'clock a. m. on the 31st day of July, 1937.

This the 30th day of July, 1937.

E. MARVIN UNDERWOOD,
U. S. Judge.

Filed July 30, 1937.

ANSWER

Now comes the respondent in the above entitled proceeding and in obedience to the writ of habeas corpus, produces the body of the petitioner at the time and place directed therein, and pursuant to Section 457 of Title 28 of the United States Code, does hereby certify that for cause of detention he holds petitioner under and by virtue of warrant of commitment issued by the United States District Court for the Northern District of Alabama. Also attached hereto and by reference incorporated herein is a copy marked "Exhibit A" of petitioner's conduct record sheet of file in the Atlanta Federal Penitentiary showing respondent's computation of petitioner's period of servitude.

Further answering, the respondent says that petitioner was originally committed to the United States Industrial Reformatory at Chillicothe, Ohio, pursuant to a sentence of 22 months. This term was executed in full less deduction for good time, and petitioner was given a confidential release in accordance with the provisions of Section 716b, Title 18, U. S. Code. After-

ward he was returned to the Atlanta Federal Penitentiary with a new sentence of 18 months, which was also imposed by the United States District Court for the Northern District of Alabama, A copy of the warrant of commitment of this case is also attached hereto, marked "Exhibit B" and is by reference made a part of this return. This sentence began on April 9, 1936, and with deduction for good time expired on June 22, 1937. At the time of recommitment under the second sentence, there remained unserved on the first sentence 132 days, representing conditional release time. If the two terms of the petitioner be computed as running concurrently, then both sentences would have expired on June 22, 1937, and it must be admitted that the writ of habeas corpus is not premature.

On March 17, 1936, a parole warrant was issued for petitioner's arrest for violation of his conditional release, a copy of which is attached hereto, marked "Exhibit C" and is by reference incorporated in this return. This warrant was never served or executed upon petitioner until after satisfaction of the said 18 months sentence, but was kept in the files of the respondent as a detainer, or, we might say, it was lodged at the prison as a detainer. In letter dated May 28, 1936, respondent was instructed by the United States Board of Parole that after expiration of the 18 months sentence, petitioner was to be held as a conditional release violator under the aforesaid conditional release violator warrant; that return was to be entered on the warrant and the same forwarded to the Parole Board and revocation was to be had at the first meeting of the Board after expiration of said 18 months sentence.

Respondent further says that the instructions of the

Parole Board were strictly complied with and the warrant was retained in the files as a detainer and not served upon petitioner during the running of said 18 months sentence, but when same was completed the said parole warrant was served upon petitioner, he was taken into custody under it, or, we might say, his custody was continued under the said parole warrant and he was held to await a hearing before the United States Board of Parole when it should next convene at the United States Penitentiary in Atlanta. The hearing was had on June 29, 1937, and as is the usual practice, it was had before one member of the Board. The evidence was taken and the entire case was continued to a meeting of the full board in Washington, D. C., with a recommendation of the parole member that the conditional release or parole of petitioner be revoked.

It will be noted from the return of the parole warrant attached hereto, marked "Exhibit C," that on June 22, 1937, petitioner completed the second sentence of 18 months and is now being held in custody as a conditional release violator to back-up or execute the unserved portion of the said 22 months sentence as stated which amounts to 132 days of conditional release time.

It is not suggested that there were any directions in either sentence as to whether the service should be consecutive or concurrent, but both sentences were silent on this point. Respondent merely contends that the jurisdiction of the Parole Board has not been exhausted and that its power to revoke petitioner's parole or conditional release is not ousted by reason of the fact that the 18 months sentence supervened before it had

heard petitioner's case on the question of revocation of conditional release time.

WHEREFORE, having fully answered, respondent prays the judgment of the Court in the premises.

Respectfully submitted,

LAWRENCE S. CAMP,
United States Attorney,

HARVEY H. TYSINGER,
Assistant United States Attorney,

H. T. NICHOLS,
Assistant United States Attorney,
Counsel for Respondent.

Filed July 31, 1937.

EXHIBIT "A"

CONDUCT RECORD
UNITED STATES PENITENTIARY
ATLANTA, GEORGIA

Record of Jeffie D. Sullivan, Color Black, No. 48112 Alias Debo Sullivan; Bill May Sullivan; Crime Vio. Interstate Commerce Act, Sentence 40 months. Fine None. Cost None. Not Committed. Received Apr. 11, 1936. Where convicted N-Ala-Huntsville. Sentenced 5-25-34, Apr. 9, 1934. Occupation Laborer. Age 19. Sentence commences Apr. 9, 1936. Full Term expires Nov. 1, 1937. (If CR Revoked) Residence, Huntsville, Ala. Action of Parole Board, Sept. 16, 1936 — DENIED.

June 29, 1937—Rec revoke. Previous Criminal Record Admits; 1933 PD, Huntsville, Ala.; same name, P. L. Dismissed. 1934 USIR, Chillicothe, O., same name, No. 9617, Vio. Int. Com. Act. 22 mos. disch. by (a) cond. rel. Nov. 13, 1935. COND. REL. VIOLATOR WANTED? (a) WANTED: The Par. Board instructed on 5-28-36 that after expiration of inst. sent., subject, as cond. rel. vio. under Reg. No. 9617-C, is to be held in custody under cond. rel. violator warrant issued Mar. 17, 1936; return to be entered on warrant and same forwarded to Par. Board: revocation to be had at first meeting of Board, after exp. inst. sentence.

VIOLATIONS

DATE 1936
AUG 2—FIGHTING IN DINING HALL

The above named prisoner was fighting with No. 47568 this morning while setting up Dining Hall for late mess. After moving them from Dining Hall they still insisted on keeping it up.—Junior Officer, John Kersey.

ACTION: Isolation on restricted diet. Reduced to 2nd Grade.

In Isol—8-2-36—10:30 A. M.
Rel Isol—8-11-36—12:15 P. M.
9 Days 1¾ Hours (3 Full Meals)

SEPT. 1 RESTORED TO FIRST GRADE

DEC. 1 STEALING FOOD.

The above prisoner stole a bowl of peaches when

they were being put out at Mess Sunday, Nov. 29th.—Guard—John Finn.

ACTION: Reprimanded and warned. Yard and amusement privileges taken for two weeks.

1-26-37 LOAFING ON THE JOB:

The above named prisoner was loafing out in the Wash Room during scrubbing time in the Dining Room, and would not do his share of the work assigned to him.—Guard: John Finn.

ACTION: Placed in Solitary Confinement and reduced to Second Grade.

In Isol—1-26-37—2:00 P. M.
Rel Isol—2-1-37-12:15 P. M. 5 Days 22 hrs. (2 Full Meals).

Feb. 25-37—RESTORED TO FIRST GRADE.

Mar. 27, 1937.
DISOBEDIENCE & INSOLENCE.

This man would not move out of a bath stall reserved for whites and when I asked for his number he refused that to me. I had to get the number off his clothing. Guard: Chas. B. McCall.

ACTION: Solitary Isolation: reduced to second grade.

In Isol—3-27—2:00 P. M.
Rel Isol—4-3-12:15 P. M. 6 Days 1 ¾ hrs (Two full meals).

Mar. 27, 1937.
DISOBEDIENCE & INSOLENCE.

This man refused to move to colored section in bath room also refused to tell me his number, said look at his clothes for number. GUARD: W. H. Lyon.

Action taken on similar case of even date.

April 1-37—INSOLENCE;

Upon my immediate entry on duty the above prisoner demanded that I turn the light off in his cell. I explained that they would be turned off at 10:00 P. M. while making my rounds just before 10:00 P. M. Sullivan jumped up before the cell door in an indignant and insolent manner shouted "You turn off that light." —E. W. Yates, Jr., Custodial Officer.

ACTION—To remain in solitary isolation and continue in second grade to May 1, 1937—

MAY 1, 1937—RESTORED TO FIRST GRADE.

June 21, 1937—POSS. OF CONTRABAND? MUTILATING GVT. PROPERTY. INSOLENCE

Sullivan claimed possession of six portions of roast beef which he hid under the table top. A table spoon was mutilated by him to form a clamp to hold the bowl in place after asking him two or three questions his manner became very insolent.—Guard—E. A. Brown, Jr. Ofcr.

ACTION — Solitary Isolation reduced to second grade.

(1 full meal) In Isol. 6-21-2 P. M. Rel. Isol—6-27-12:30 P. M. 5 Days 22 1-2 hrs.

5-25-34: Sentenced to 22-mos. 6-8-34: Rec'd. at USIR. 11-13-35: Released Condly. from there.

3-17-36: Declared CR Vio., has 132 Days to serve, if CR Revoked.

4-9-36: Sentenced to 18 mos.

4-11-36: Rec'd here as No. 48112. 6-22-37: Sentence expired as No. 48112.

6-23-37: In custody as Cond. Rel. Vio. from USIR, Chillicothe.

EXHIBIT "B"

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA

FOR THE NORTHERN DISTRICT OF ALABAMA

NORTHEASTERN DIVISION

To the President of United States of America:

To the Marshal of the United States for the Northern District of Alabama and to the Warden of the United States Penitentiary at Atlanta, Georgia, GREETING:

Whereas, at the April term of said Court, 1936, held at Huntsville, Ala., in said district and division, to wit,

on April 9th, 1936, JEFFIE D. SULLIVAN, *aliases* Debo Sullivan, Bill May Sullivan, was sentenced by said Court, upon his conviction by a jury to be committed to the custody of the Attorney General of the United States or his authorized representative, for imprisonment in a penitentiary for and during the term and period of eighteen (18) months beginning on the date on which he is received at the Penitentiary for service of said sentence; or if said prisoner shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, said sentence shall begin on the date on which he is received at such jail or other place of detention; or until he shall be otherwise discharged by due course of law, for violation of Section 409, Title 18, USC. (Did enter a railroad car containing an interstate shipment of freight from Huntsville, Ala., to Pinckneyville, Ill., with intent to commit larceny therein).

(Defendant convicted on Count No. 1 of the Indictment).

And Whereas, the Attorney General of the United States has designated the United States Penitentiary at Atlanta, Georgia, as the place of confinement where the sentence of said JEFFIE D. SULLIVAN, *with aliases* shall be served.

Now, this is to command you, the said Marshal, forthwith to take said JEFFIE D. SULLIVAN, with *aliases* and him safely transport to said United States Penitentiary and him there deliver to said Warden of said Penitentiary with a copy of this writ; and you, the said Warden, to receive said JEFFIE D. SULLI-

VAN, *with aliases* and him keep and imprison in accordance with said sentence, or until he shall be otherwise discharged by due course of law.

A TRUE COPY:

W. S. LOVELL, *Clerk,*
U. S. District Court, Northern District of Ala.

By James L. Pugh, *Deputy Clerk*

WITNESS the Honorable David J. Davis, Judge of said Court, and the seal thereof, affixed at Huntsville, Alabama, in said district, this 9th day of April, 1936.

W. S. LOVELL, Clerk.

James L. Pugh, *Deputy Clerk.*

RETURN

I have executed the within writ in the manner following to-wit: On April 9th, 1936, I delivered said Jeffie D. Sullivan, *with aliases* to the Warden of the Madison County Jail temporarily pending tranfer to the institution herein designated for the service of sentence, and on April 11, 1936, I delivered said Jeffie D. Sullivan to the Warden of U. S. Penitentiary at Atlanta, Georgia, together with a copy of this commitment.

ALEX SMITH, *United States Marshal*

By J. H. Garth, *Deputy.*

I hereby certify that the within named federal pris-

oner was committed to the Madison County Jail, Huntsville, Alabama, and began serving sentence in this case on this the 9th day of April, 1936.

ALEX SMITH, *United States Marshal.*

EXHIBIT "C"

DEPARTMENT OF JUSTICE

WASHINGTON, D. C.

WARRANT

FOR RETAKING PRISONERS RELEASED

UNDER AUTHORITY

PUB. 210, 72D CONGRESS

THE UNITED STATES BOARD OF PAROLE

To any Federal Officer Authorized to Serve Criminal Process Within the United States.

WHEREAS, Jeffie D. Sullivan, No. 9617-C was sentenced by the United States District Court for the Northern District of Alabama to serve a sentence of twenty-two months, for the crime of Vio. Sec. 409 T 18 USC—Theft from Interstate Shipment of Freight and was on the 13th day of November, 1935, released conditionally from the U. S. Industrial Reformatory, Chillicothe, Ohio.

AND, WHEREAS, satisfactory evidence has been presented to the undersigned Member of this Board

that said prisoner named in this warrant has violated the conditions of his release and is therefore deemed to be a fugitive from justice:

NOW, THEREFORE, this is to command you to execute this warrant by taking the said Jeffie D. Sullivan, wherever found in the United States, and him safely return to the institution hereinafter designated.

WITNESS my hand and the seal of this Board this 17th day of March, 1936.

When apprehended communicate with Director, Bureau of Prisons for instructions.

ARTHUR D. WOOD,
Chairman, U. S. Board of Parole.

U. S. Penitentiary,
Atlanta, Ga.
June 23, 1937

The within named Jeffie D. Sullivan on June 22, 1937, completed a sentence of 18 months imposed 4-9-36, and is being held in custody as a conditional release violator to complete the within mentioned sentence of 22 months, under which he was released conditionally Nov. 13, 1935.

B. F. BATES, *Record Clerk.*

ORDER SUSTAINING WRIT AND DISCHARGING PETITIONER.

The above case came on for a hearing, and was duly heard and considered.

This case involves the same questions as those in the case of *Kidwell vs. Zerbst*, No. 1192 *Habeas Corpus*, decided by this Court on May 13, 1937, and is controlled by the rulings made therein.

Therefore, for the reasons set forth in an opinion and order filed in the case of *Kidwell vs. Zerbst*, and upon authority of same;

IT IS CONSIDERED, ORDERED AND ADJUDGED that the writ of habeas corpus be and hereby is sustained, and that respondent discharge petitioner from custody forthwith.

This 31st day of July, 1937.

E. MARVIN UNDERWOOD,

United States Judge.

Filed July 31st, 1937.

PETITION FOR APPEAL

TO THE HONORABLE E. MARVIN UNDERWOOD, JUDGE OF SAID COURT:

The above named appellant, F. G. Zerbst, as Warden of The United States Penitentiary at Atlanta, Georgia, feeling himself aggrieved by the judgment and order of the Court made and entered in the above stated cause on the 31st day of July, 1937, wherein the writ of habeas corpus was sustained, and the petitioner was ordered discharged from custody, does hereby appeal from said judgment and order to the United States Circuit Court of Appeals for the Fifth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and prays that his appeal be allowed and citation issue as provided by law, and that a transcript of record, proceedings and papers upon which said judgment and order were based, duly authenticated, may be sent to the United States Circuit Court of Appeals for said Circuit.

Appellant further shows that this appeal is prosecuted by and under the direction and authority of the Attorney General of the United States of America, and he, therefore, prays that said appeal may be allowed without bond.

LAWRENCE S. CAMP,
United States Attorney.
HARVEY H. TYSINGER,
Asst. U. S. Attorney,
H. T. NICHOLS,
Asst. U. S. Attorney,
Counsel for Respondent.

Filed July 31, 1937.

ORDER GRANTING APPEAL

The foregoing petition considered and the appeal is allowed as prayed; and the appeal being prosecuted by direction of the Attorney General of the United States;

IT IS ORDERED that the same be allowed without bond being given by appellant. It is further ordered that pending the determination of this appeal, appellee shall be released on bail in the sum of $100.00 without sureties.

Dated this 31st day of July, 1937.

E. MARVIN UNDERWOOD,
United States Judge.

Filed July 31, 1937.

JUDGE'S CERTIFICATE AS TO EVIDENCE

I, E. Marvin Underwood, Judge of said Court, do hereby certify that at the trial of the above stated matter the only evidence introduced consisted of the petition and response together with the exhibits thereto attached, and said pleadings are hereby settled as the evidence in said case.

This 31st day of July, 1937.

E. MARVIN UNDERWOOD,
United States Judge.

Filed July 31, 1937.

ASSIGNMENT OF ERRORS

And now on the 31st day of July, 1937, comes the appellant by his counsel, Lawrence S. Camp, United States Attorney, Harvey H. Tysinger, Assistant U. S. Attorney, and H. T. Nichols, Assistant U. S. Attorney, all of said District, and say that the judgment and order entered in the above stated cause on the 31st day of July, 1937, is erroneous.

1. Because the Court erred in ruling that the terms of petitioner's sentences shall run concurrently instead of consecutively.

2. Because the Court erred in not ruling that the Parole Board's action was independent of the trial court's jurisdiction of the parolee in the sentence imposed in the second case.

3. Because the Court erred in not ruling that the commission of a new federal crime by the parolee would not absolve the parolee from penalty for violation of parole.

4. Because the Court erred in ruling that the familiar rule of concurrence of sentences silent as to sequence of service is applicable to the case at bar, and in failing to rule that the Board of Parole's action to revoke the original sentence was independent of that of the new sentence imposed by the trial court.

5. Because the court erred in failing to recognize that it was the legislative intent to vest the Board of

Parole with authority to prescribe the punishment for violation of parole.

6. Because the Court erred in ruling that where a prisoner is released on parole, and is tried and sentenced for another offense afterward, which last sentence is silent as to order of service, and subsequently the convict is returned to the penitentiary, and serves the latter sentence, that the first sentence runs concurrently with the latter, and that the Parole Board has no power to hold its warrant as a detainer, and, after completion of the second sentence, to serve it on the prisoner and to compel execution of the unexpired portion of the first or parole sentence.

7. Because under the undisputed facts as set forth in the petition for *habeas corpus* and in the answer or return of the respondent, the Court erred in sustaining the *writ of habeas corpus* and in ordering the petitioner discharged from custody.

WHEREFORE, the respondent prays that the said judgment and order be reversed, and that the District Court be directed to discharge said *writ of habeas corpus* and to remand the petitioner to the custody of respondent.

LAWRENCE S. CAMP.
United States Attorney.
HARVEY H. TYSINGER,
Asst. U. S. Attorney.
H. T. NICHOLS,
Asst. U. S. Attorney.
Counsel for Respondent.

Filed July 31, 1937.

PRAECIPE

TO THE CLERK OF THE ABOVE-ENTITLED COURT:

You will please prepare transcript of record in this cause, to be field in the office of the Clerk of the United States Circuit Court of Appeals for the Fifth Judicial Circuit, under the appeal heretofore perfected to said Court, and include in said transcript the following pleadings, proceedings and papers on file, to-wit:

1. The original petition for habeas corpus and order allowing same.

2. The return of the respondent with exhibits attached thereto.

3. The judgment and order of Court of July 31, 1937.

4. Petition for appeal and order of Court allowing same.

5. Judge's certificate as to the evidence.

6. The assignment of errors.

7. This praecipe.

Said transcript to be prepared and transmitted to the United States Circuit Court of Appeals for the Fifth

Judicial Circuit as required by law and the rules of said Circuit Court of Appeals.

LAWRENCE S. CAMP,
United States Attorney.

HARVEY H. TYSINGER,
Asst. U. S. Attorney.

H. T. NICHOLS,
Asst. U. S. Attorney.

Filed July 31, 1937.

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA)
)ss:
NORTHERN DISTRICT OF GEORGIA.)

I, J. D. Steward, Clerk of the District Court of the United States in and for the Northern District of Georgia, do hereby certify that the foregoing and attached 18 pages contains a true, full, complete and correct copy of the original record, assignments of error and all proceedings had in the matter of -

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, RESPONDENT,
Appellant,

versus

JEFFIE D. SULLIVAN, PETITIONER,
Appellee,

as specified in the praecipe of counsel herein and as

the same remains of record and on file in the clerk's office of the said District Court, at Atlanta, Georgia, except that the original citation with acknowledgment of service thereon is included herein in the stead of a copy thereof.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of the said District Court, at Atlanta, Georgia, this the 4th day of August, A. D., 1937.

(SEAL)

J. D. STEWARD,
Clerk, United States District Court, Northern District of Georgia.

By
C. A. McGrew, *Deputy Clerk.*

Original citation omitted from the printed record, the original thereof being on file in the office of the Clerk of the United States Circuit Court of Appeals.

That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument and submission

Extract from the Minutes of October 6, 1937

No. 8555

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA

v.

JEFFIE D. SULLIVAN

On this day this cause was called, and, after argument by Bates Booth, Esq., Special Assistant to the Attorney General, for appellant, was submitted to the Court.

Opinion of the court and dissenting opinion of Sibley, circuit judge

Filed November 10, 1937

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 8468

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, APPELLANT

v.

SHERMAN KIDWELL, APPELLEE

No. 8476

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, APPELLANT

v.

DEWEY SMITH, APPELLEE

No. 8477

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, APPELLANT

v.

ALLEN COLLINS, APPELLEE

No. 8478

FRED. G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, APPELLANT

v.

WALTER OWENS, APPELLEE

No. 8495

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, APPELLANT

v.

FRANK PEEL, APPELLEE

No. 8516

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, APPELLANT

v.

BENNIE JONES, APPELLEE

No. 8527

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, APPELLANT

v.

HENRY STONE, APPELLEE

No. 8555

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, APPELLANT

v.

JEFFIE D. SULLIVAN, APPELLEE

Appeals from the District Court of the United States for the Northern District of Georgia

November 10, 1937

Before FOSTER, SIBLEY, and HOLMES, Circuit Judges

FOSTER, Circuit Judge: These eight cases were argued and submitted together, present the same questions for decision, and may be conveniently disposed of by one opinion. The material facts common to all the cases are these. Appellees, while serving sentences in federal prisons, were released on parole or by reduction of their sentences for good conduct. Before the maximum terms of their sentences had expired they committed federal offenses for which they were convicted and sentenced to imprisonment in the Atlanta penitentiary.

The judgments were silent as to the time these second sentences were to begin. In each case, after the prisoner was incarcerated under the second sentence, a member of the Parole Board issued a warrant, directed to any federal officer authorized to serve criminal processes within the United States, reciting that satisfactory evidence had been presented to him that (the person named) had violated the condition of his release, was deemed to be a fugitive from justice, and commanding that the warrant be executed by taking the prisoner, wherever found in the United States, and returning him safely to the institution hereinafter designated. However, the warrant did not designate the institution. The warrants were sent to the warden of the Atlanta penitentiary with a letter instructing him to place the warrant as a detainer and to take the prisoner named into custody on the warrant at the expiration of his present sentence. The letter further instructed that the case should be listed for a hearing on the violation charge only after (the person named) is in custody on the warrant. The warrants were served and appellees were detained as instructed. Appellees were released on habeas corpus after each had served more time in the penitentiary after his return thereto than the remainder of his first sentence, without deducting any allowance for good conduct or the time he was at large on parole or conditional release before being returned to serve the second sentence.

There are some slight variations of the facts in each case. Illustrating these differences in the broadest way, we may refer to the facts more in detail as appearing in the case of Sullivan, No. 8555. Sullivan was convicted in the Northern District of Alabama in May 1934 and sentenced to serve 22 months imprisonment. He was committed to the United States reformatory at Chillicothe, Ohio, was allowed a credit of 132 days on his sentence for good conduct, and released. While at large he was again convicted in the same court and was sentenced to serve 18 months in the Atlanta penitentiary, that institution having been designated by the Attorney General. He was delivered to the Madison County jail on April 9, 1936, awaiting transportation to the Atlanta penitentiary, and was delivered to the latter institution on April 11, 1936. He was again granted credit for good conduct and his second sentence expired on June 22, 1937, at which time he had served 439 days in the Atlanta penitentiary. He was not released but was held in jail on a warrant issued by the Parole Board on March 17, 1936, awaiting a hearing as to the revocation of his conditional release on the first sentence. After a hearing he was ordered discharged on habeas corpus July 31, 1937. He had then been detained 39 days beyond the expiration of his second sentence.

There is no doubt the Parole Board had jurisdiction over the appellees when they were released from prison on their first sentences. Under the provisions of the Act of June 29, 1932 (47 Stat. 381; 18 U. S. C. A. 716b), prisoners granted a reduction of sentence for good conduct are provisionally released, subject to all the provisions of the parole laws.

It is immaterial whether appellees were conditionally released or paroled from prisons other than the Atlanta penitentiary. Under the provisions of the Act of May 14, 1920 (46 Stat. 326; 18 U. S. C. A. § 753f), in imposing sentences courts are restricted to specifying the type of institution in which the prisoner is to be confined and he is committed to the custody of the Attorney General, who designates the place of confinement. The various prisons are but units of a single system under the control of the Attorney General and he is authorized to transfer any prisoner from one institution to another for any reason sufficient to himself. White vs. Kwaitkowski, 60 F. (2d) 264.

It is the general rule that where a person is confined in an institution under two separate sentences they run concurrently, in the absence of any provision to the contrary. Aderhold vs. McCarthy, 65 F. (2d) 452.

Appellant makes no point as to the place of confinement and does not dispute the general rule as to the concurrence of sentences. However, it is contended in each case that the running of the original sentence was suspended during the period the prisoner was incarcerated on the second sentence; and that the parole laws confer on the Parole Board power to require consecutive service of sentences, notwithstanding the general rule. In support of this appellant relies upon Anderson vs. Corall, 263 U. S. 193.

The parole law was adopted by the Act of June 25, 1910 (36 Stat. 819). A separate parole board was created for each jail where federal prisoners were confined, with authority to grant parole after a prisoner had served one-third of a sentence exceeding one year. By section 4 of the Act (18 U. S. C. A. § 717), upon reliable information tending to show violation of parole the warden was authorized to issue his warrant for retaking the prisoner at any time within the term of the prisoner's sentence. Section 6 of the Act (18 U. S. C. A. § 719) provides as follows:

"At the next meeting of the board of parole held at such prison after the issuing of a warrant for the retaking of any paroled prisoner, said board of parole shall be notified thereof, and if said prisoner shall have been returned to said prison, he shall be given an opportunity to appear before said board of parole, and the said board may then or at any time in its discretion revoke the order and terminate such parole or modify the terms and conditions thereof. If such order of parole shall be revoked and the parole so terminated, the said prisoner shall serve the remainder of the sentence originally imposed; and the time the prisoner was out on parole shall not oe taken into account to diminish the time for which he was sentenced."

The parole law was amended by the Act of May 13, 1930 (46 Stat. 272). In lieu of the various parole boards a single board of parole was created and all the powers theretofore vested in the various boards and the Attorney General were transferred to the new board. Section 3 of the Act (18 U. S. C. A. 723 c) provides as follows:

"The Board of Parole created by section 723a of this title, or any member thereof, shall have the exclusive authority to issue warrants for the retaking of any United States prisoner who has violated his parole. The unexpired term of imprisonment of any such prisoner shall begin to run from the date he is returned to the institution, and the time the prisoner was on parole shall not diminish the time he was originally sentenced to serve."

In Anderson vs. Corall, supra, it appears that Corall was paroled from Leavenworth Penitentiary on February 24, 1916. On June 28, 1916, the warden issued a warrant for retaking him as a parole violator. Before he was retaken, in October, 1916, he was convicted at Chicago for violation of a state law and sentenced to the Illinois State penitentiary where he was confined until some time in December, 1919. After his release from that prison he was retaken on the warden's warrant and, in January, 1920, the Parole Board revoked his parole. It was held that parole did not suspend service or operate to shorten the term; that while on parole a convict remains in legal custody, under the control of the warden, until the expiration of his term; that Corall's violation of the parole and his confinement in the Joliet penitentiary interrupted his service in question and his status was in legal effect the same as if he had escaped from the control and custody of the warden; and that the Board was authorized, at any time during his term of sentence, in its discretion, to revoke the order and terminate the parole and require him to serve the remainder of the sentence originally imposed, without any allowance for the time he was out on parole. The case was decided by the Supreme Court November 12, 1923. It can not be considered a construction of the provisions of Section 3 of the Act of May 13, 1930, which was adopted thereafter. The case may be otherwise easily distinguished from those at bar. While confined in the Illinois prison Corall could not possibly have been considered as serving the balance of his federal sentence concurrently with the state sentence.

When appellees were delivered to the penitentiary at Atlanta the provisions of section 3 of the Act of May 13, 1930, immediately took effect and the unexpired portions of their first sentences began to run from that date. The province of the warrants was to secure the return of the prisoners. Since they were already in custody the issuance of the warrants was vain and useless. The warden held the prisoners under both sentences. In Hill vs. Wampler, 298 U. S. 460–465, it was said:

"A warrant of commitment departing in matter of substance from the judgment back of it is void. * * * Being void and not merely irregular, its nullity may be established upon a writ of habeas corpus. * * * 'The prisoner is detained, not by virtue of the warrant of commitment, but on account of the judgment and sentence.' * * * If the judgment and sentence do not authorize his detention, no 'mittimus' will avail to make detention lawful."

By necessary implication section 3 requires the Parole Board to have a hearing on a parole violation at its first meeting after the

prisoner is returned to custody. Cf. Escoe vs. Zerbst, 295 U. S. 490. Conceding that thereafter the Parole Board may delay entering the order of revocation in its discretion, the time in which that may be done is limited by the unexpired term of imprisonment. After the prisoner had paid the full penalty of the law it was unnecessary to revoke his parole and the Board was without jurisdiction to do so. It is argued on behalf of appellant that parole violators should be punished and that unless the Parole Board could defer the running of the sentence upon which he was paroled there would be no way to make the sentences run consecutively. The punishment provided by Congress for violation of parole is loss of good time and the time the prisoner may have been at large on parole. In many cases this would be a rather severe punishment. It is not the province of the Parole Board to amend the law by its rules and regulations or to take upon itself the imposition of punishment not provided by law.

The conclusion we reach is that in each case the first and second sentences ran concurrently from the day the prisoner was delivered to the Atlanta penitentiary on the second sentence; that the Parole Board was without authority to delay a hearing on the violation charge and to order that the sentence be served consecutively. In each case the appellee had served more than the remainder of the maximum term for which he was originally sentenced and was entitled to release on habeas corpus.

The judgments appealed from are affirmed.

SIBLEY, Circuit Judge, dissenting: The conclusion reached by the majority makes impractical any real punishment for the federal offenses committed while out on parole. It is true that the violation of the parole is punished by a loss of good time on the old sentence and by having to serve it in full. But that is all punishment for the old offense and its incidents. It would be suffered whether there was a second federal offense or some other failure to keep parole. Suppose the remainder of the old sentence is two years, and the maximum sentence for the new offense is two years or less. If, as the Court holds, the sentences must be served concurrently, there is no real punishment for the new crime. The judge can do nothing effectual about it. He cannot terminate the parole or order the arrest of the prisoner as a parole violator, for exclusive power to do all that is expressly vested by Section 3 of the Act of May 13, 1930, in the Board of Parole and its members. If he should direct the new sentence to take effect on the completion of the old, would he release the prisoner meanwhile? Could the prisoner thus be at large for years if the Board failed to act? Would it be right to leave the prisoner in this state of uncertainty? The judges here making the second sentences did what seemed to them their plain duty and their only function: they fixed a punishment for the new offenses and committed the prisoners for its service. The Parole Board, within its function of superintending the execution of the old sentences which had been interrupted by parole, thought parole had probably been violated; and if so, the old sentences should be served in full as the

parole statute expressly directs. This policy of the statute would not really be carried out by presently terminating the paroles and putting the old sentences into concurrent service with the new. It could only be done by postponing revocation of the paroles, indeed by postponing arrest and return to the penitentiary under the old sentences.

The Board accordingly issued warrants but suspended arrests. This I think was in their discretion under the circumstances and for the purpose disclosed. Section 6 of the Parole Act, 18 U. S. C. A. § 719, expressly says that at the next meeting at the prison after the issue of a warrant (which originally might have been issued by the Warden without knowledge of the Board) the Board shall be notified, and if the prisoner has been returned to prison he shall have opportunity to appear before the Board, "and the said Board may then or at any time in its discretion revoke the order and terminate such parole or modify the terms and conditions thereof." Here is express discretionary authority given to postpone the revocation of the parole. If the Board thinks a prisoner ought to serve the old sentence in full, as the Parole Act says he shall, after he has finished serving a new sentence, it can by postponing revocation accomplish it. Where the prisoner has been arrested on a parole warrant and committed to the penitentiary on it alone, he is of course serving his old sentence and not to be prejudiced by the Board's delay; but where he is not so committed, but on an independent charge, this does not follow. To prevent any contention that he is now serving the old sentence, the Board directed that arrest under the parole warrant to be postponed. I think this was within the Board's discretion also.

Since the warrant has been issued and the prisoner is in the prison, though not by virtue of the parole warrant, it may be that he has a right under the literal words of Section 6 to make a prompt showing before the Board on the question whether he has broken parole. He might otherwise lose his evidence. But that is not the question here. These prisoners have been turned loose as having served their old sentences while serving the new, contrary to the will and discretion of the Board, and that result, it seems to me, is not in accordance with law and justice.

Judgment

Extract from the Minutes of November 10, 1937

No. 8555

FRED G. ZERBST, WARDEN, UNITED STATES PENSTENTIARY, ATLANTA, GEORGIA

v.

JEFFIE D. SULLIVAN

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

SIBLEY, Circuit Judge, dissenting.

Clerk's certificate

UNITED STATES OF AMERICA,

United States Circuit Court of Appeals, Fifth Circuit.

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 25 to 37 next preceding this certificate contain full, true, and complete copies of all the pleadings, record entries, and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 8555, wherein Fred G. Zerbst, Warden, United States Penitentiary, Atlanta, Georgia, is appellant, and Jeffie D. Sullivan is appellee, as full, true, and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 24 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 10th day of December, A. D. 1937.

[SEAL]

OAKLEY F. DODD,
Clerk of the United States Circuit Court of Appeals, Fifth Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1938

Supreme Court of the United States

Order allowing certiorari

Filed March 28, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice REED took no part in the consideration or decision of this application.

U. S. GOVERNMENT PRINTING OFFICE: 1938